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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 431.

THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

VS.

THE ANDROSCOGGIN MILLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED JUNE 5, 1874.

90 U.S. (23 Wall.) 574

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the seventh judicial circuit and district of Indiana, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you between "The Androscroggin Mills" and "The Evansville and Crawfordsville Railroad Company," a manifest error hath happened, to the great damage of the said "Evansville and Crawfordsville Railroad Company," as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together
2 with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Nathan Clifford, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court.

Done at Evansville, this 7th day of February, A. D. 1874.

[SEAL.] J. D. HOWLAND, *Clerk.*

3 United States of America to "The Androscoggin Mills," greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein "The Evansville and Crawfordsville Railroad Company" is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the honorable James C. Hopkins, one of the judges of said circuit court, this 7th day of February, A. D. 1874.

J. C. HOPKINS,
Pre. Judge.

3½ Came to hand February 4th, 1874.

I have served this writ on the Androscoggin Mills by reading and delivering a true copy to James M. Warren, attorney for said mills, February 4th, 1874.

BEN. SPOONER,
U. S. Marshal,
By SAMUEL DAY, *Deputy.*

Citation & copy 3.00; return 10—$3.10.

4 Pleas of the circuit court of the United States for the district of Indiana, began and held at the United States court-rooms, in the city of Evansville, in said district, before the honorable James C. Hopkins, judge of the district court of the United States for the western district of Wisconsin, designated by the honorable Thomas Drum-

mond, judge of the 7th judicial circuit of the United States, to aid the judge of the district court of the United States for the district of Indiana in holding the district or circuit court of the United States for said district of Indiana.

Be it remembered that heretofore, to wit, on the 9th day of October, A. D. 1873, there was filed in the office of the clerk of said court a declaration in the words and figures following, to wit:

United States circuit court, district of Indiana, ss. October term, A. D. 1873.

"Androscoggin Mill," a corporation incorporated under the laws of the State of Maine, and located and doing business in the State of Maine, plaintiff in this suit, complains of the Evansville and Crawfords-
5 ville Railroad Company, a corporation incorporated under the laws of the State of Indiana, and located within the State of Indiana, and within the jurisdiction of this court, defendant, of a plea of trespass on the case upon promises, for that whereas heretofore, to wit, on the 10th day of January, A. D. 1873, at Columbus, in the State of Mississippi—that is to say, at the district of Indiana, the defendant being a common-carrier of goods and chattels for hire, made, executed, and delivered to Mitchell & Co., of Columbus, Mississippi, at Columbus, Mississippi, its certain bill of lading signed by L. Q. Ayres, its agent at Columbus, Mississippi, thereby then and there acknowledged to have received at Columbus, Mississippi, from said Mitchell & Co., at Columbus, Mississippi, two hundred bales of cotton consigned by said Mitchell & Co. to B. F. Bates, treasurer of the Androscoggin Mill, at Boston, in the State of Massachusetts, and thereby then and there, being a common-carrier, as aforesaid, agreed to deliver in good order the said two hundred bales of cotton to the said B. F. Bates, the plaintiff's treasurer at Boston, Massachusetts, in consideration of the sum of ten dollars per bale from Columbus, Mississippi, to Boston, Massachusetts,
6 upon the payment of the freight and charges thereon. And plaintiff avers that the defendant, being a common-carrier, as aforesaid, the said Mitchell & Co., at Columbus aforesaid, on the 10th day of January, 1873, aforesaid, at the special instance and request of the defendant, delivered to the defendant, so being a common-carrier as aforesaid, at Columbus aforesaid, the said two hundred bales of cotton of the plaintiff, of great value, to wit, of the value of $21,293.55, to be taken care of and safely and securely carried by the defendant, as such carrier, from Columbus, Mississippi, aforesaid, to Boston, Massachusetts, to be safely and securely delivered by the defendant to said B. F. Bates, plaintiff's treasurer as aforesaid, in consideration of a certain reward, to wit, the sum of ten dollars per bale, to be paid to the defendant in that behalf, and the plaintiff avers that it was ready and willing to receive and pay the freight and charges on said cotton according to the terms and conditions of said bill of lading, at Boston, upon the delivery of the same. And the defendant, being a common-carrier as aforesaid, then and there, to wit, at the State of Indiana, aforesaid, undertook and faithfully promised the said
7 plaintiff for the consideration aforesaid to take care of said two hundred bales of cotton, and safely and securely to carry and convey the same to said B. F. Bates, the plaintiff's treasurer, in good order, at Boston, Massachusetts, and although the defendant, as such carrier as aforesaid, then and there had and received the said two hundred bales of cotton for the purposes aforesaid, yet said defendant, not regarding its duty as such common carrier, nor its said promises and

undertaking, hath not taken care of thirty of the said two hundred bales of cotton of the value of $3,196.65, or safely or securely delivered the said thirty bales of cotton to the said B. F. Bates, the plaintiff's treasurer, at Boston, Massachusetts, aforesaid, but on the contrary thereof, the defendant, being such common carrier as aforesaid, has hitherto wholly neglected and refused, and still doth neglect and refuse, to deliver the said thirty bales of cotton aforesaid, or any part thereof, to the plaintiff, at Boston aforesaid, according to the terms and conditions of said bill of lading, although often requested so to do, and by reason of the non-
8 delivery of said thirty bales of cotton, the same became and were wholly lost to the plaintiff, to its damage of five thousand dollars, and therefore it brings this suit, &c.

JA'S M. WARREN,
Att'y for Plaintiff.

Copy of Bill of Lading.—Filed with Complaint.

EVANSVILLE & CRAWFORDSVILLE R. R. CO.

Great through Fast-Freight Route to all points North and East via Pennsylvania Central, Erie, and New York Central Railroads.

Contract for a through rate.

A. E. SCHRADER, *Gen'l Freight Agent.*

EVANSVILLE, IND.	COLUMBUS, MISS., *Jan'y* 10, 1873.
This reliable through line makes the shipment of cotton and tobacco a specialty, and guarantees quick time and delivery in good order.	Received from Mitchell & Co. the following packages [contents unknown] in apparent good order, viz:

Mark.	Consignees and destination.	Articles.	Weight, subject to correction.
◇B A◇	B. F. Bates, Tr., Boston, Mass.	200 bales cotton.	

The Evansville & Crawfordsville R. R. Co. hereby agree that upon arrival at Evansville and delivery of the property above described
9 and consigned, they will receive and forward said property to destination upon the following conditions: That the shipper, owner, and consignee do hereby release the said Evansville and Crawfordsville R. R. Co., and the boats and railroads with which they connect, from the acts of Providence, or from damage or loss by fire or other casualty, while in depots or places of transhipment; also, damage or delays by unavoidable accidents; also, loss by fire, collision, or dangers of navigation, or for loss or difference in weight, torn baggage, or condition of said property.

Printed in red ink in the exhibit. *Clerk.*

The Evansville & Crawfordsville Railroad Company will not be liable for loss or damage by fire from any cause whatever. All property shipped on this contract will be subject to the expense of necessary repairs and remarking. In all events of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same. Said property to be forwarded immediately after its arrival at Evansville, or as soon thereafter as it is ready for shipment, and to

be delivered at Boston, Mass., upon the payment of the freight and charges as herein specified. In witness whereof the agent hath
10 affirmed to 4 bills of lading of this tenor and date, one of which being accomplished, the other, to stand void. Through rate $10.25 per bale from Columbus to Boston.

L. Q. AYRES, *Agent.*

Whereupon there issued out of the office of the clerk of said court a summons in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Indiana, ss:

The President of the United States to the marshal of said district, greeting:

You are commanded to summon the Evansville and Crawfordsville Railroad Company, if it may be found in your district, to be and appear before the circuit court of the United States for said district, to be holden before the judges thereof at Evansville, fifteen days after service is perfected next, to answer unto Androscoggin Mills, citizen of the State of Maine, in a plea of trespass on the case on premises. Damages $5,000. And have you then and there this writ.

Witness honorable Nathan Clifford, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court this
11 9th day of October, A. D. 1873.

[SEAL.] J. W. HOWLAND, *Clerk.*

Which summons was afterwards, to wit, on the 9th day of October, A. D. 1873, returned into the office of the clerk of said court with the following endorsement thereon:

"Come to hand October 9th, 1873.

"I have served this writ on the Evansville and Crawfordsville Railroad Company, by reading and delivering a copy to John Ingle, president of said company. Oct. 9th, 1873.

"BEN. SPOONER,
"*U. S. Marshal,*
"By GEO. DENZER, *Deputy.*"

Service & copy 3.00; ret. 10—$3.10.

And afterwards, to wit, at the special October term, 1873, of said circuit court, and on Tuesday, the 14th day of October, A. D. 1873, the same being the first day of said term, the following further proceedings in said cause were had, viz:

ANDROSCOGGIN MILLS *v.* THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY.	No. 86.	Trespass on case.

Now here, on motion of plaintiff's counsel, a rule is entered requiring the defendants to file its answer herein by Wednesday, October 15, 1873.

12 And afterwards, to wit, on Wednesday, the 15th day of October, A. D. 1873, the same being the second day of the said special Oc-

tober term, 1873, of said circuit court, the following further proceedings in said cause were had, to wit:

ANDROSCOGGIN MILLS
v.
THE EVANSVILLE & CRAWFORDSVILLE RAILroad Company. } No. 86. Trespass on the case.

Comes now the defendant, by Messrs. Asa Igleheart & Son, its counsel and files its answer in one paragraph in the words and figures following:

ANDROSCOGGIN MILLS
v.
THE EVANSVILLE AND CRAWFORDSVILLE RAILroad Company. } No. 86.

In the circuit court of the United States for the district of Indiana.

Said defendant, by Asa Igleheart & Son, its attorneys, comes, and for answer to the plaintiff's complaint, says:

That defendant admits that said plaintiff delivered to the defendant's agent at Columbus, Mississippi, the several bales of cotton mentioned in the complaint; that said agent executed and delivered to the
13 plaintiff the bill of lading, of which a copy is made an exhibit to the complaint; that said 30 bales of cotton were never delivered to the plaintiff in Boston, Massachusetts, as is alleged in said complaint.

But the plaintiff ought not to have and maintain its said action against said defendant, because it says: That said 30 bales of cotton, for the non-delivery of which this action is prosecuted, were, with the other bales of cotton, placed upon the cars of the Mobile and Ohio Railroad, to be transported thence by railroad and steamboat to Evansville, and thence by the defendant's road, and other connecting roads, to Boston aforesaid, there to be delivered to said plaintiff's secretary, according to the true intent and meaning of said bill of lading.

That while the said 30 of cotton were so laden upon said cars, and in transitu between Columbus, Mississippi, and Evansville aforesaid, and before the same was delivered to the defendant, at Evansville, to be transported upon its road as aforesaid, became and was, by accident and without any fault upon the part of the defendant, wholly destroyed by fire, whereby the same was wholly lost, and whereby
14 it became and was impossible for the defendant to deliver the same to the plaintiff.

And the defendant avers that, according to the true intent and meaning of said bill of lading, the defendant is in no way liable for said cotton, or for the non-delivery thereof; wherefore it prays judgment for costs.

ASA IGLEHEART & SON,
Att'ys for Def'ts.

And thereupon a rule is entered requiring the plaintiff to file its reply herein by the next calling of this cause.

And afterwards, to wit, on Thursday, the 16th day of October, A. D. 1873, the same being the third day of said special term of said court, the following further proceedings in said cause were had:

ANDROSCOGGIN MILLS
vs.
THE EVANSVILLE & CRAWFORDSVILLE RAILroad Company.

No. 86. Trespass on case on premises.

Comes now the plaintiff, by James M. Warren, its attorney, and files its demurrer in the words and figures following:

15 United States circuit court, district of Indiana, October term, 1873.

ANDROSCOGGIN MILLS
vs.
EVANSVILLE & CRAWFORDSVILLE R. R. Co.

And the said plaintiff comes and defends the wrong, &c., and says that the defendant's plea, and the matters and things therein contained, are not sufficient [in] law to constitute a valid defence to the plaintiff's cause of action; wherefore, &c.

JAMES M. WARREN,
Att'y for Plaintiff.

And afterwards, to wit, on Saturday, the 18th day of October, 1873, the same being the fifth day of the said special term of said circuit court, the following further proceedings in said cause were had, to wit:

ANDROSCOGGIN MILLS
v.
THE EVANSVILLE & CRAWFORDSVILLE RAILroad Company.

No. 86. Trespass on the case, &c.

Come now the parties, by counsel, and the said plaintiff saith that the demurrer by him heretofore filed to the said defendant's an-
16 swer ought to be sustained. And thereupon the said defendant saith that its said answer is good and sufficient in law; and the court having heard the argument of counsel, and being advised in the premises, doth now here sustain said demurrer; to which ruling of the court the defendant, by its counsel, excepts; whereupon the defendant, by its counsel, moves for leave to amend its answer by adding an additional paragraph, which is granted.

And afterwards, to wit, on Tuesday, the 21st day of October, 1873, the same being seventh day of the said special term of said circuit court, the following further proceedings in said cause were had, to wit:

ANDROSCOGGIN MILLS
vs.
THE EVANSVILLE & CRAWFORDSVILLE RAILroad Company.

No. 86. Trespass on case, etc.

Comes now the defendant, by Asa Igleheart & Son, its attorneys, and files its amended answer herein, in the words and figures following, to wit:

In the circuit court of the United States for the district of Indiana, October term, 1873.

17 ANDROSCOGGIN MILLS
v.
THE EVANSVILLE AND CRAWFORDSVILLE Railroad Company.

PAR. 1.—The defendant's amended answer to the plaintiff's complaint filed by leave of the court. Said defendant denies each and every allegation in said complaint contained.

PAR. 2. For a further answer to said complaint said defendant says that it is a corporation, created, constituted, and organized under the several acts of the legislature of the State of Indiana, and authorizing the construction of a railroad from the city of Evansville to the city of Terre Haute, in the State of Indiana, for the carriage of freight and passengers between said points, and not otherwise; that, under and by virtue of said several acts of said legislature, said defendant has constructed, and for a long time maintained, a railroad between said points in said State for said purpose; that this said defendant denies that it received and agreed, or promised, or undertook to forward said cot-

18 ton to Boston or elsewhere, except as hereinafter mentioned. But this defendant says that said town of Columbus, in said State of Mississippi, is situate upon the Mobile and Ohio Railroad, which extends from said town to the Ohio River, at the town of Paducah, in the State of Kentucky; that said Mobile and Ohio Railroad Company, these defendants, and the Evansville and Cairo Packet Company had an arrangement by which freight was to be received by the agents of the defendant, and placed upon the cars of said last-mentioned railroad, and by said company transported to Paducah aforesaid, and there delivered to said packet company on board of their boats, and by them transported to Evansville, and by said boats delivered to the defendants, who carried the same over their roads, and delivered the same to connecting roads, who, under a like arrangements, continued said transportation of the same to the cities of Boston and New York upon a through rate of freight from Columbus, Mississippi, to Boston; that, under said arrangements, the defendant received the cotton mentioned in the complaint

19 by its agents, and who issued the bill of lading sued on herein, and of which a copy, being a fac-simile in letter and color of ink, is herewith filed; that, prior to the issuing and delivering of said bill of lading, said agent had, in pursuance of a universally recognized usage of carriers of cotton, whether by steamer or railroad, in said State of Mississippi and other cotton-growing States, stipulated that said defendants and all others carrying said cotton should be exempt from loss by fire, and, upon the delivery of said bill of lading or receipt, said plaintiff's agent had his attention called to the red lines in said receipt, exempting said defendants from any such liabilities from Columbus to Boston, and said agent then and there accepted the same with that condition and upon that consideration, and immediately obtained insurance from loss by fire upon the same.

And the defendant avers that, after said cotton was so received at Columbus aforesaid, the same was laden upon the cars of the Mobile and Ohio Railroad, and that, while being transported by said Mobile and Ohio Railroad Company from said town of Columbus, Mississippi,

20 to said town of Paducah, Kentucky, 30 bales of said cotton—the same that is sued for here—were, without the fault or negligence

of said Mobile and Ohio Railroad Company, and without any fault or negligence of said defendants, accidentally destroyed by fire.

Wherefore said plaintiff ought not to have and maintain its action against this defendant.

PAR. 3. Said defendant, further answering, says that said plaintiff insured said 200 bales of cotton in an insurance company, to the defendant unknown, and that said thirty bales were destroyed by fire; and thereupon the plaintiff collected from said insurance company the full value of said 30 bales of cotton sued for herein, to wit, $3,196.65; wherefore the defendant says the plaintiff ought not to recover.

ASA IGLEHEART & SON,
Att'ys for the Defendant.

Copy of Exhibit B filed with said amended answer.

EVANSVILLE & CRAWFORDSVILLE R. R. Co.

Great through fast freight route to all points north and east, via., Pennsylvania Central, Erie, and New York Central Railroads.

Contract for a through rate.

A. E. SHRADER,
Gen'l Freight Agent, Evansville, Ind.

This reliable through line makes the shipment of cotton and tobacco a specialty, and guarantees quick time and delivery in good order.

COLUMBUS, MISS., *Jan. 10th* 1873.
Received from Mitchell & Co. the following packages (contents unknown) in apparent good order, viz:

Mark, consignees, and destination.	Articles.	Weight, Subject to correction.
BA B. F. Bates, tr., Boston, Mass.....	200 bales cotton	

The Evansville & Crawfordsville R. R. Co. hereby agree that, upon arrival at Evansville, and delivery of the property above described and consigned, they will receive and forward said property to destination upon the following conditions: That the shipper, owner, and consignee do hereby release the said Evansville & Crawfordsville R. R. Co., and the boats and railroads with which they connect, from the acts of Providence, or from damage or loss by fire or other casualty while in depots or places of transhipment; also, damage or delays by unavoidable accidents; also, loss by fire, collision, or dangers of navigation, or for loss or difference in weights, torn baggage, condition of said property.

22

Printed in red ink in the Exhibit. Clerk.

The Evansville & Crawfordsville Railroad Company will not be liable for loss or damage by fire, from any cause whatever.

All property shipped on this contract will be subject to the expense of necessary repairs and remarking. In the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same. Said property to be forwarded immediately after its arrival at Evansville, or as soon thereafter as it is ready for shipment, and to be delivered at Boston, Mass., upon the payment of the freight and charges as herein specified.

In witness whereof the agent hath affirmed to 4 bills of lading of this tenor and date, one of which being accomplished, the other to stand void.

Through rate, $10.25 per bale from Columbus to Boston.

L. Q. AYRES, *Agent.*

And on the day and date last aforesaid, and at the time of the filing of the said amended answer by said defendant, the interrogatories in the words and figures:

23 In the circuit court of the United States for the district of Indiana.

ANDROSCOGGIN MILLS
v.
THE EVANSVILLE AND CRAWFORDSVILLE Railroad Company. } No. 86.

Said defendant prays that the plaintiff may be required to answer, under oath, the following interrogatories:

1st. State whether the 30 bales cotton for which this suit is brought were insured.

2nd. If you say said cotton was insured, state in what insurance company the same was so insured, and whether said insurance was against loss by fire.

3rd. If you say said 30 bales of cotton were insured against loss by fire, state whether you have recovered or received from any insurance company the value thereof, or any part thereof. State how much you have received, and when and from whom you received the same.

ASA IGLEHEART & SON,
For Def't.

Were filed by said defendant.

And afterwards, to wit, on the 23d day of October, A. D. 1873,
24 the same being the ninth day of said special October term, 1873, of said circuit court, the following further proceedings in said were cause had, viz:

ANDROSCOGGIN MILLS
v.
THE EVANSVILLE AND CRAWFORDSVILLE Railroad Company. } No. 86. Trespass on the case, etc.

Comes now the plaintiff, by counsel, and files its demurrer, in the words and figures following, to wit:

United States circuit court, October special term, 1873.

ANDROSCOGGIN MILLS
v.
EVANSVILLE & CRAWFORDSVILLE R. R. Co.

And the said plaintiff, by James M. Warren, its attorney, comes and defends the wrong and injury, when, &c., and says that the defendants' second and third paragraphs of its amended answer, they, or either of them, do not contain facts sufficient to defeat the plaintiff's action. Wherefore it prays judgment, &c.

JA'S M. WARREN,
Att'y for Plaintiff.

And thereupon says that said amended answer in said second
25 and third paragraphs is not good and sufficient in law.

And thereupon the said defendant comes, also by counsel, and says that its amended answer as to said second and third paragraphs is good and sufficient in law.

And thereupon the said plaintiff withdraws its demurrer to said third paragraph of said amended answer.

And the court having heard the argument of counsel, and being advised in the premises, doth now here sustain said demurrer to said second paragraph of said amended answer, whereto defendant, by counsel, excepts.

And thereupon the said plaintiff files its reply in the words and figures following:

United States circuit court, October special term, 1873.

ANDROSCOGGIN MILLS
v.
EVANSVILLE & CRAWFORDSVILLE R. R. Co.

And the said plaintiff, by Ja's M. Warren, its attorney, comes and defends the wrong and injury, when, &c., and says that it denies each and every allegation contained in the defendant's third plea to the
26 declaration of the plaintiff. Wherefore it prays judgment, &c.

JA'S M. WARREN,
Att'y for Plaintiff.

To said third paragraph of said amended answer.

Now, here, by agreement, this cause is continued until the next term of this court.

And be it further remembered that, afterwards, to wit, on Tuesday, the 3d day of February, A. D. 1874, the same being the second day of the regular February term, 1874, of said circuit court of the United States for the district of Indiana, the following further proceedings in said cause were had, viz:

ANDROSCOGGIN MILLS
v.
THE EVANSVILLE & CRAWFORDSVILLE Railroad Company

No. 86. Trespass on the case, etc.

Comes now Messrs. Igleheart & Son, counsel for the defendant, and file a motion for leave to file an additional paragraph of the defendant's answer.

And afterwards, to wit, on Wednesday, the 4th day of Febru-
27 ary, A. D. 1874, the following further proceedings in said cause were had:

ANDROSCOGGIN MILLS
v.
THE EVANSVILLE & CRAWFORDSVILLE Railroad Company.

No. 86. Trespass on the case, etc.

Come now the parties by counsel, and argument is made on the motion filed on yesterday by the plaintiff for leave to file an additional paragraph of the answer; and the court, having heard the argument of

counsel, and being advised in the premises, doth now here overrule said motion; to which ruling of the court the defendant, by counsel, excepts.

And afterwards, to wit, on Saturday, the 7th day of February, A. D. 1874, the same being the sixth day of the said February term, 1874, of said circuit court of the United States for the district of Indiana, the following further proceedings in said cause were had, viz:

ANDROSCOGGIN MILLS
v.
THE EVANSVILLE & CRAWFORDSVILLE Railroad Company.
} No. 36. Trespass on the case on promises.

28 And now comes the plaintiff, by James M. Warren, its attorney, and the defendant also comes by its attorneys, Asa Igleheart and J. E. Igleheart, and withdraws the first and third paragraphs of its amended answer, and the defendant, declining to answer further, but standing upon its original answer, and the second plea or paragraph of its amended answer, to which demurrers were heretofore severally sustained, and to which rulings of the court thereon exceptions were at the time, and have been, duly taken;

And the court being sufficiently advised, it is considered that said original answer is insufficient in law, because the same does not state facts sufficient to constitute a defense; to which ruling of the court the defendant excepts. And it is further considered that said second paragraph of the answer is insufficient in law, because the same does not state facts sufficient in law to constitute a defense; to which ruling of the court the defendant excepts. It is therefore considered that said plaintiff recover of the defendant its damages; to which defendant excepts. But, inasmuch as the court is not advised as to the amount of the damages, by consent and agreement of the parties this cause
29 is submitted to the court, without the intervention of a jury, for the assessment of damages. And the court having heard the evidence, and being sufficiently advised, doth assess the plaintiff's damages at two thousand nine hundred and seventy-five dollars and eighty-two cents, ($2,975.82.)

It is therefore considered that the plaintiff recover of and from the defendant said sum of two thousand nine hundred and seventy-five dollars and eighty-two cents, together with the costs of suit in this behalf expended. To which the defendants excepts, and notifies the court that it will prosecute a writ of error to the Supreme Court of the United States. And thereupon the bail is fixed at four thousand dollars.

30 In the circuit court of the United States for the district of Indiana.

THE ANDROSCOGGIN MILLS
v.
THE EVANSVILLE AND CRAWFORDSVILLE Railroad Company.
} Action at law.

We, the Evansville and Crawfordsville Railroad Company, John E. Martin, and John S. Hopkins, are held and bound unto the Androscoggin Mills in the penal sum of four thousand dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed and dated the 13th day of February, 1874.

The condition of the foregoing obligation is such, that whereas said defendant has sued out a writ of error from the Supreme Court to said circuit court for the reversal of a judgment rendered in said circuit court in favor of said plaintiff and against said defendant, at the February term, 1874, of said court, at Evansville:

Now, if said defendant shall prosecute said writ of error with
31 effect, and abide by and perform all such judgments as shall be rendered or affirmed against it in said Supreme Court, and shall pay and satisfy all such judgments as shall be rendered or affirmed against it, together with all costs that may accrue in said court, then this obligation shall be void; else in force.

Evansville & Crawfordsville Railroad Company.

[SEAL.] J. E. MARTIN, *President.*
J. E. MARTIN. [SEAL.]
J. S. HOPKINS. [SEAL.]

(Endorsed:) No. 86. Androscoggin Mills *v.* The E. & C. R. R. Co Bond in error. Approved Feb'y 6th, 1874. J. C. Hopkins, pr. judge. Filed Feb'y 16th, 1874. J. D. Howland, clerk. Asa & J. E. Igleheart, att'ys for def't.

32 DISTRICT OF INDIANA:

I, John D. Howland, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings had in the within-entitled cause, as fully as the same appears of record now on file in my office at Evansville.

Witness my hand and the seal of said court this twenty-fifth day of April, A. D. 1874.

J. D. HOWLAND, *Clerk.*

DISTRICT OF INDIANA:

I, Walter Q. Gresham, judge of the district court of the United States for said district, do certify that at the date of the foregoing certificate John D. Howland was, and now is, the clerk of the circuit court of the United States for said district, and that his attestation aforesaid is in due form of law.

Witness my hand this 25th day of April, 1874.

W. Q. GRESHAM.

33 In the Supreme Court of the United States, October term, 1874.

THE EVANSVILLE AND CRAWFORDSVILLE Railroad Company, pl'ff in error,
vs.
THE ANDROSCOGGIN MILLS, DEFENDANT in error.

The said plaintiff in error says there is manifest error in the foregoing record, judgment, and proceedings in this, to wit:

First. The circuit court sustained the demurrer of the defendant in error to the first paragraph of the answer of the plaintiffs in error to the complaint, or the first plea to the declaration; whereas the same should have been overruled.

Second. Said court sustained said demurrer of said defendant in error

to the 3d paragraph of said answer to said complaint, or the third plea to the declaration; whereas said demurrer ought to have been overruled.

Third. Said court sustained said demurrer to the said third paragraph of said answer, or said third plea; whereas by the law of the land said demurrer should have been sustained to said complaint or declaration.

Fourth. Said court rendered final judgment upon the sustaining of said demurrer against said plaintiff in error and in favor of said defendant in error; whereas said judgment should have been rendered in favor of the plaintiff in error and against said defendant in error. For these and other manifest errors said plaintiff in error prays a reversal of said judgment of said circuit court.

ASA IGLEHART,
Attorney for Pl'ff in Error.

(Indorsement on cover:) No. 431. The Evansville and Crawfordsvill-Railroad Company, plaintiff in error, vs. The Androscoggin Mills. Indiana, C. C. U. S. Filed 5th June, 1874.

No. 431.

In the Supreme Court of the United States.

The Evansville & Crawfordsville R. R. Co.

PLAINTIFF IN ERROR,

VS.

The Androscoggin Mills,

DEFENDANT IN ERROR.

ABSTRACT, ASSIGNMENT OF ERRORS AND ARGUMENT

BY

ASA IGLEHART,

Counsel for Plaintiff in error.

EVANSVILLE, INDIANA.
Journal Co., Printers, Stationers and Binders.

1874.

In Supreme Court of United States.

The Evansville & Crawfordsville Railroad Company, *Plaintiff in error,* vs. The Androscoggin Mills, *Defendant in error.*	Error to the Circuit Court for the District of Indiana.

Abstract of the Record.

This was an action of assumpsit, or in code phraseology, upon a money demand on contract, by the defendant in error against the plaintiff in error, upon a bill of lading issued by the plaintiff in error for the carriage of 200 bales of cotton from Columbus, Miss., to Boston, Mass.

The complaint alleges that the plaintiff is a corporation existing under the laws of the State of Maine, and that the defendant is an Indiana corporation, and a common carrier. That on, &c., the defendant at Columbus, Mississippi, made and delivered to the plaintiff's agent a bill of lading acknowledging the receipt of 200 bales of cotton to be carried by the defendant from Columbus to Boston and then and there delivered the same to the plaintiff, whereby in consideration of $10 per bale, said defendant undertook to safely carry and deliver the same to the plaintiff at Boston; and that thereupon the plaintiff delivered said cotton to the defendant, then a common carrier, &c., said 200 bales of cotton, of the value of $21,293.55, to be taken care of and to be safely carried by the defendant from Columbus to Boston, and there delivered to the plaintiff's agent.

That the plaintiff was willing and ready to pay the freight and receive the cotton, but that the defendant did not safely take care of and deliver 30 bales of said cotton to the plaintiff, but neglected and refused to deliver the same according to the terms and conditions of the said bill of lading.

The bill of lading is not set out as an exhibit to the complaint, according to the Indiana code of practice. 2 G. & H. R. S., p. 104, sec. 88. But a copy is attached to to the complaint but forms no part of it.

An answer was filed to which a demurrer was sustained and upon leave, an amended answer in three paragraphs was filed.

The first and third paragraphs of this answer were afterwards withdrawn, and a demurrer was sustained to the second paragraph, and the defendant standing upon its demurrer, the Court rendered final judgment for the plaintiff for the value of the 30 bales of cotton.

The second paragraph of the amended answer is in the following words and figures:

PAR. 2. For further answer to the said complaint said defendant says, that it is a corporation constituted and organized under the several acts of the legislature of the State of Indiana, authorizing the construction of a railroad from the city of Evansville to the city of Terre Haute, in the State of Indiana, for the carriage of freight and passengers betwen said points, and not otherwise. And that under and by virtue of said several acts of said legislature said defendant has constructed and for a long time maintained a railroad between said points in said State for said purpose. This defendant denies that it received and agreed or promised or undertook to forward said cotton to Boston or elsewhere, except as hereinafter mentioned. But this defendant says that said town of Columbus, in said State of Mississippi, is situate upon the Mobile & Ohio Railroad which extends from said town to the Ohio River at the town of Paducah in the State of Kentucky.

That said Mobile & Ohio Railroad Company, this defendant and the Evansville & Cairo Packet Company had an arrangement by which freight was to be received by the agents of the defendant and placed upon the cars of said last mentioned railroad and by said company transported to Paducah aforesaid and there delivered to said packet company on board of their boats and by them transported to Evansville and by said boats delivered to the defendant who carried the same over its road and delivered the same to the connecting roads, who, under a like arrangement, continued said transportation of the same to the cities of Boston and New York, upon a through rate of freight from Columbus, Mississippi, to Boston. That under said arrangement the defendant received the cotton mentioned in the complaint by its agent, and who issued the bill of lading sued on herein, and of which a copy, being a *fac simile* in letter and color of ink, is herewith filed. That prior to the issuing and delivering of said bill of lading, said agent had, in pursuance of a universally recognized usage of carriers of cotton, whether by steamer or by railroad, in said State of Mississippi and other cotton growing states, stipulated that said defendant and all others carrying said cotton should be exempt from loss by fire, and upon the delivery of said bill of lading or receipt, said plaintiff's agent had his attention called to the red lines in said receipt exempting said defendants from any such liabilities from Columbus to Boston, and said agent then and there accepted the same with that condition, and upon that consideration and immediately obtained insurance from loss by fire upon the same. And the defendant avers that after said cotton was so received at Columbus aforesaid, the same was laden upon the cars of the Mobile & Ohio Railroad, and that while being transported by said Mobile & Ohio Railroad Company from said town of Columbus, Mississippi, to said town of Paducah, Kentucky, 30 bales of said cotton, the same that is sued for here, without the fault or negligence of said Mobile & Ohio Railroad Company, and without any

fault or negligence of said defendants, was accidently destroyed by fire. Wherefore, said plaintiff ought not to have and maintain its action against this defendant.

The bill of lading made an exhibit to the answer under the code, reads as follows:

Evansville & Crawfordsville R. R. Co. Great Through Fast Freight Route to all points North and East, via Pennsylvania Central, Erie and New York Central Railroad. Contract for a through rate.

A. E. Schrader, Gen'l Freight Agt.
Evansville, Ind.

This reliable through line makes the shipment of Cotton and Tobacco a specialty, and guarantees quick time and delivery in good order.

Columbus, Mississippi, Jan. 10th, 1873.

Received from Mitchell & Co., the following packages (contents unknown) in apparent good odeer, viz:

Mark, Consignee and Destination.	Articles.	Weight, Subject to Correction.
B. A. B. F. Bates, tr. Boston, Mass.	200 Bales Cotton.	

The Evansville & Crawfordsville R. R. Co., hereby agree that upon arrival at Evansville and delivery of the property above described and consigned, they will receive and forward said property to destination, upon the following conditions. That the shipper, owner and consignee do hereby release the said Evansville & Crawfordsville R. R. Co., and the boats and railroads with which they connect, from the acts of providence, or from damage or loss by fire or other casualty while in the depots or places of transhipment, also damage or delays by unavoidable accidents, or

loss by fire, collision or dangers of navigation, or for loss or difference in weight, torn baggage or condition of said property.

Printed in Red Ink in Exhibit. *The Evansville & Crawfordsville Railroad Company will not be liable for loss or damage by fire from any cause whatever.*

All property shipped on this contract will be subject to the expense of necessary repairs and re-marking. In all events of loss or damage under the provisions of this agreement the value or cost at the point of shipment shall govern the settlement of the same; said property to be forwarded immediately after its arrival at Evansville or as soon thereafter as it is ready for shipment and to be delivered at Boston, Mass., upon the payment of the freight and charges as herein specified.

In witness whereof, the Agent hath affirmed to 5 Bills of Lading of this tenor and date, one of which being accomplished, the others to stand void. Through rate $10.25 per bale from Columbus to Boston.

L. Q. Ayres, Agent.

The exhibition of this instrument to the answer is in accordance with Section 88 of the code, *Supra*.

ASSIGNMENT OF ERRORS.

The Evansville & Crawfordsville Railroad Company, *Plaintiff in error.* **vs. The Androscogsin Mills,** *Defendant in error.* — **In the Supreme Court of the United States. October Term, 1874.**

The said plaintiff in error says there is manifest error in the foregoing record, judgment and proceedings in this, to-wit:

First. The Circuit Court sustained the demurrer of the defendant in error to the original answer of the plaintiffs in error to the complaint, or the first plea to the declaration, whereas the same should have been overruled.

Second. Said Court sustained said demurrer of said defendant in error to the 2d paragraph of the amended answer to said complaint, or the second amended plea to the declaration, whereas said demurrer ought to have been overruled.

Third. Said Court sustained said demurrer to the said second paragraph of said amended answer or said second amended plea, whereas by the law of the land said demurrer should have been sustained to said complaint or declaration.

Fourth. Said Court rendered final judgment upon the sustaining of said demurrers against said plaintiff in error and in favor of said defendant in error, whereas said judgment should have been rendered in favor of the plaintiff in error and against said defendant in error. For these and other manifest errors said plaintiff in error prays a reversal of said judgment of said Circuit Court.

ASA IGLEHART,
Counsel for Pl'ff in error.

ARGUMENT.

We will consider the third and fourth errors assigned first, as they relate to the sufficiency of the complaint.

The demurrer to the second paragraph of the amended answer (as well as the first) reached back to the complaint, and if the complaint is bad the Court should have sustained the demurrer to it instead of the answer. Stephens on Pl. 143; Gould on Pleading, chap. 9, sec. 36–37, (and this under the Indiana code though the answer be good. Armstrong vs. Cook, 30 Ind. 22) and Chitty's Pl. 668. Again, an insufficient declaration may be taken advantage of even on error. And if the declaration be insufficient, the judgment should be for the defendant. Heard & Stephen on Pleading, 119, 120, 121.

Is the complaint sufficient?

As a common law declaration it is good, but as a code complaint it is insufficient for want of compliance with the foregoing provisions of the code, and this ommission renders the complaint bad upon demurrer, under the general assignment that "the complaint does not state facts sufficient to constitute a cause of action." Niles vs. Brooks, 21 Ind. 178: Alsop vs. Hutchings, 25 Ind. 347; Coleman vs. Hart, Id. 256; Starkey vs. Neere, 30 Ind. 222. And in Price vs. The Grand Rapids, &c., R. R. Company, 13 Ind. 58, it is held that it must be averred that the copy is filed, or in other words that this provision of the code contemplates setting out written instruments in *Hæc verba* in the complaint, or making them exhibits after the manner of the chancery practice, and therefore though a party may file a copy of some written instrument, yet it is useless unless the identity of the instrument sued on and the one filed should be shown by averment. The case at bar is a good illustration of the necessity of such an averment, for the bill of lading set out by its terms in the complaint is not the same of which a copy seems to be filed.

If, therefore, the Court should construe the fifth section of the act of Congress of 1872, to apply to pleading, the pleading in this case must be adjudged insufficient as a complaint.

But certainly no other construction can be given to this section of the act. If, in determining the sufficiency of the pleadings in a case, we must look to all the rules both of the common law and the code, the act of Congress intended to produce harmony will produce confusion.

But as the point is technical I shall not elaborate it. But even if the Court hold that a copy should have been filed, yet it may be contended that the copy filed, the same exhibited as a part of the second paragraph of the amended answer.is sufficiently filed. But the complaint is not aided by this view because if the copy filed be taken as an exhibit still the bill of lading set out in the complaint is not the same of which a copy is filed. The former being a simple con-

tract to safely carry and deliver, and the latter a contract containing three express conditions, viz: against liability for loss by fire, collision or dangers of navigation, and the complaint taken as such or as a declaration is bad for not either averring the particular manner in which the goods were lost, so that the Court might know whether the loss was within the exception, or by expressly negativing the exceptions.

The rule is well laid down upon this point by Mr. Gould (Gould on Pleading, chap. 4, sec. 20) and in Angell on Carriers, fourth edition, p. 375, sec. 446. See also Latham vs. Rutley, 2 B. & C. 20. Austin vs. The Manchester Railway Co., V. Eng. Law & Eq. R. 329, is very much in point.

In Latham vs. Rutley, C. J. Abbott lays down the rule thus. "The result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading. But if a stipulation be made that under certain circumstances he shall not be liable at all, that must be stated. Now here it appears that in either of two events the carrier was not to be responsible at all." And the exception was not stated in the declaration, and so the declaration was held ill. The two exceptions referred to by his Lordship were *fire* and *robbery*.

The principle is precisely the same, though the question does not arise in the same way. The whole contract is set out, if it is sufficiently pleaded, and shows the exceptions, but the complaint does not show that the loss occurred under the contract. It neither shows how the loss occured, by setting out the particular manner, so that the Court might see by reference to the contract that the loss occurred within the terms of it, nor does it negative the exceptions and show that the loss was not within them.

The complaint simply avers that it was the duty of the defendant to safely carry and deliver, but pays no attention to the exceptions, thereby showing a variance between the contract sued on and the one set out, and in assigning the breach it simply alleges a breach of the duty imposed by

the contract described by the averments in the pleading, but not imposed by the contract set out. The contract described in the pleading and upon which the breach is assigned, is a contract to safely carry and deliver, while the one exhibited and attempted to be made a part of the complaint under the code is to safely carry and deliver, provided the property is not destroyed by the dangers of navigation, collision or fire. Hence it is clear that the exhibition of the written contract would correct any error or omission in setting it out, yet there is no sufficient breach assigned to enable the plaintiff to recover. For correcting the contract set out by the one exhibited and we have a contract to safely carry and deliver unless the defendant should be prevented by certain dangers excepted, but the assignment of the breach that the defendant did not safely carry and deliver is too narrow; it may be true and still the defendant not be liable. As before stated the plaintiff should either specifically show a loss by some cause outside the exceptions, or aver generally that the safe carriage and delivery were not prevented by any of the excepted causes.

I think I need not elaborate this point further. It is very clear that there is no assignment of the breach of the contract in the complaint sufficient to enable the plaintiff to recover, and for this reason the third and fourth errors are well assigned, because the Court ought in the first place to have sustained the demurrer filed to the second paragraph of the amended answer, or in the second place to have rendered final judgment for the defendant on the record, there being no sufficient complaint upon which to found the judgment for the plaintiff.

But whether the third and fourth errors are well assigned or not, the first and second errors as is submitted must reverse the judgment of the Circuit Court.

The second error really embraces all that is contained in the first. The second parapraph of the amended answer contains all the allegations of the original answer and more too.

The second paragraph simply alleges, admitting that there is enough in the complaint *prima facie* to justify a recovery, that the 30 bales of cotton were lost by fire before the same reached Evansville.

Two questions arise upon the sufficiency of this paragraph. The first arises upon the construction of the bill of lading, and the second upon the construction of the exceptions in the bill of lading.

The bill of lading acknowledges receipt of the cotton at Columbus, Mississippi, but only undertakes to carry the same when it arrives at Evansville, and to consrtue the undertaking according to its terms, the Railroad Company is not liable till the goods reached Evansville, and as the answer shows that the goods never reached Evansville and were never delivered to the company within the terms of the contract sued on, there is no liability.

A bill of lading is usually a receipt and an agreement safely to carry and deliver. Here the receipt purports to be an acknowledgment that the goods were delivered at Columbus. Upon this, without the agreement to carry and deliver, no action would lie on the instrument. The active portion of the contract upon which the action is brought, the agreement to carry and deliver, and the failure to do which is the breach assigned, only applies to goods delivered at Evansville. Indeed, upon this ground alone it is very questionable whether the complaint with the agreement set out is not bad for not avering that the goods were delivered at Evansville.

But clearly if we construe the agreement according to its plain import, the answer is a defense, upon this ground, no agreement to carry, consistent with the answer, can be predicated on the bill of lading.

But it is alleged that the complaint aids the bill of lading. But this cannot be so, as the plaintiff is limited by the written contract set out. If other terms are averred than those shown in the contract set out, the contract will operate as a limitation upon the complaint. The contract

set out in the answer is a different one from the one set out in the complaint by averment. If the action had been assumpsit without a copy of the bill of lading, the bill of lading exhibited to the answer could not have been given in evidence under the general issue on account of varience. *Latham vs. Rutley; Austin vs. The Manchester Railway Company, Supra.* This being true, the special answer setting up a different contract alone is good on demurrer.

The second point is too simple for argument. It is not denied that it is competent to introduce these exceptions and that the Court will enforce them.

This being the case, I shall not discuss the point till some reason is given why the answer is not good. There are numerous averments in this paragraph of the answer that are, perhaps, unnecessary, but they are introduced for the purpose of showing clearly that the attention of the consignee was directed to the exceptions. But as they were introduced as conditions in the contract, the shipper and consignee are bound by them without the additional averments, and if the answer shows a loss within these conditions, it is a good defense. This, I presume, will not be questioned, and therefore it is scarcely worth while to spend time discussing it.

But it is insisted that the answer is not good because by the express terms of the bill of lading the undertaking of the plaintiff in error is to carry from *Evansville* to Boston, and the exceptions being confined to the contract to carry the goods between the points mentioned, the allegation that the loss occurred before the goods reached Evansville, does not bring it within the exception; in other words, the exception being confined and limited to a contract for carrying *from Evansville* cannot be extended to a loss of the goods while in the possession of the carrier before they reached Evansville, and that for the loss occurring before the goods reached Evansville, the common law liability attaches. But this argument proves too much. It is conceeded on all hands that the exception is co-extensive with

the contract for carriage in the bill of lading if, therefore, the exceptions do not apply to losses before the goods reached Evansville, neither does the contract for carrying extend there, and hence the answer is clearly good, for there is no pretense of any right of action except upon the contract contained in the bill of lading.

But the true ground upon which the action could in any event be maintained is, that notwithstanding the express terms of the bill of lading, still as the plaintiff in error took possession of the goods at Columbus and accepted freight through to Boston that it became a contract to carry under the bill from Columbus to Boston.

There is some plausibility in this view, but upon this theory there can be no question that the exception extends to whatever the contract is made to embrace by consstruction.

But the theory that the contract is extended to reach the carriage from Columbus, but that the exceptions are confined to the literal terms of the contract, is illiberal and inconsistent with all the rules of construction of written contracts.

If the defendant in error had ignored the bill of lading in its action and claimed that the contract did not extend to the carriage of the goods before they reached Evansville, and therefore the loss by fire was no defense, and had brought an action founded upon the delivery and receipt of the goods, then it would have been necessary for the plaintiff in error to plead or put in evidence the bill of lading, and thereby raise the question whether the contract did embrace the carriage of the goods from Columbus to Evansville. And if it is held that the copy of the bill of lading is not properly exhibited to the complaint, the record may be regarded in a very similar shape, the complaint being upon a different contract, the answer setting up the real contract and thereby negativing the complaint.

But if the bill of lading is to be regarded as a part of the complaint the aspect of the case is changed by the form

of the action and the allegations of the complaint. After setting forth the making and delivery of the bill of lading and setting out what purports to be the substance of the contract in the bill of lading, to-wit: an acknowledgment of the receipt of the goods and an undertaking to carry them from Columbus to Boston and there deliver to the defendant in error, the complaint then proceeds: "and thereby being then and there a common carrier as aforesaid, agreed to deliver said 200 bales of cotton to the said B. F. Bates, the plaintiff's treasurer, at Boston, Massachusetts, in consideration, etc." Then after an averment of a promise in conformity with the terms of said bill of lading as before described in the complaint, the complaint assigns for breach that though the plaintiff was willing to receive and pay freight on said cotton, the defendant did not take care of 30 bales of said cotton and safely and securely deliver the same to the plaintiff's treasurer, &c., at Boston aforesaid according to the terms and conditions of said *bill of lading*. So that the action is alone upon the contract set out in the bill of lading.

The case of Woodward vs. The Illinois Central Railroad Company, 1 Bissel, 403, was an action on the case by the plaintiff against the defendant as a common carrier, ignoring any bill of lading. Upon the trial before Mr. Justice Davis, the defendant was permitted to introduce in evidence a bill of lading in the following form.

"Shipped by Dan. Able, (for account of E Meyer) Forwarding and Commission Merchant, Bradley Block, foot of Jefferson Street, in good order and condition, on board the good steamboat called the *John H. Dickey*, whereof ————————is master for the present voyage, the following articles, being marked and numbered as follows; and are to be delivered without delay in the like good order and condition at the port of *Cairo* (fire and unavoidable dangers of the river only excepted) unto *Graham, Able & Co.*, or to *their* assigns, he or they paying freight at the rate of *two and* 97-100 *dollars per* 100 *lbs., through to Baltimore* and

charges. In witness whereof, the owner, master or clerk of said boat hath affirmed to five bills of lading all of this tenor and date, one of which being accomplished the others to stand void. Dated at Memphis, the *24th day of Oct.* 1862.

Marks.	Articles.	Weight.
L. D. from 1 to 50	(50) Fifty Bales Cotton.	

Not accountable for condition, hoops off or bagging torn, and owner assumes all risk of fire and unavoidable accidents en route to destination.

W. G. Cirode, for
Dan'l Able & Co., Agent Ills. Central R. R.
For Woodward, Baldwin & Co.,
Baltimore, Md."

And Mr. Justice Davis charging the jury, says:

"There is no question that the Agent of the Illinois Central Railroad at Memphis did contract with the agents of the plaintiffs for the safe delivery of this cotton either at Cairo or Baltimore. It is contended by the plaintiffs' counsel that the bill of lading, given in evidence, was only the contract of the parties as far as Cairo, and that from Cairo the general responsibility of common carriers must attach. The Court is of a different opinion and holds that the bill of lading in this case, which is the contract between the parties, and by which their rights are to be determined, binds the defendant to deliver the cotton safely at Baltimore, unless it should be destroyed by fire. Common carriers, whether steamboats or railroads, generally contract for the safe transportation of freight only as far as their railroad or steamboat route extends. But there is no valid reason why the Illinois Central Railroad Company, if it chooses to employ agents at Memphis to feed the road, can not make a contract there for the safe conveyance of freight over the different lines of communication to its place of destination."

Again his Honor proceeds: * * * "But common carriers have a right to restrict their liability, especially when so inflammable an article as cotton is offered them for transportation."

There was a new trial, and the case was again tried before Judge Drummond (1 Bissel, 447) who gave the contract the same construction.

That case and this are singularly coincident, that being simply in its facts the converse of this, the principle involved being the same.

A question of pleading under the common law practice might arise here which I mention in a precautionary way. In an action of assumpsit the defense claimed here might be made under the general issue, but under the code of practice which is adopted by the Act of Congress, (2 G. & H. p. 93, sec. 66,) all defenses except the mere denial of the allegations of the complaint must be specially pleaded. Hence we could not show under our general denial that though we received the goods and undertook to carry them, yet that they were lost by fire without negligence. But we had to plead this defense specially. See authorities cited in note 2 to sec. 66, *Supra*.

In conclusion I submit that the judgment of the Circuit Court ought to be reversed for the reasons stated, to-wit:

1. The complaint is bad, as a complaint, for want of conformity to the provisions of the code in exhibiting the written instrument sued on.

2. If the Court shall disregard the technical point in this respect, still it is bad for failing properly to assign the the breaches, as is shown by the authorities cited.

3. If the Court hold the complaint good, then the judgment should be reversed because of the ruling of the Court upon the demurrer to the answer.

(a) Because the bill of lading is only an undertaking to carry the goods from Evansville to Boston, and the answer shows that they burned without the fault of the plaintiff in error before they reached Evansville.

(b) But if the Court should hold the bill of lading to be a contract to carry from Columbus to Boston, then most clearly the whole contract with all its conditions and stipulations is also extended to the whole distance.

(c) This being the case, the answer shows that the loss of the cotton occurred *by fire* without fault or negligence of the plaintiff in error, and therefore it was exempt from liability under the bill of lading.

It is quite unnecessary to extend this argument. I ask on behalf of the plaintiff in error, and with great confidence, a reversal of the judgment of the Court below. Of course I have felt it my duty to present all the points which seemed to me available, but I suggest that upon a reversal it will be especially desirable to have the opinion of the Court upon the construction of the contract.

(It is proper to remark that the errors are incorrectly assigned upon the record. But as the rule rather requires the abstract and assignment of errors to accompany the brief, I have made a *corrected* assignment, which I ask may be taken as an amendment of the assignment of errors on the record.)

ASA IGLEHART,
Counsel for Plaintiff in error.

No. 431.

In the Supreme Court of the United States.

The Evansville & Crawfordsville R. R. Co.
PLAINTIFF IN ERROR,

VS.

The Androscoggin Mills,
DEFENDANT IN ERROR.

ARGUMENT

BY

CHARLES DENBY,
Counsel for Defendant in error.

EVANSVILLE, INDIANA.
Journal Co., Printers, Stationers and Binders.

1874.

In the Supreme Court of the United States.

The Evansville and Crawfordsville Railroad Company,
Plaintiff in Error.
vs.
The Androscoggin Mills.

Error to the Circuit Court for the District of Indiana.

ARGUMENT OF COUNSEL FOR THE DEFENSE.

The first objection taken by the counsel for the plaintiff in error, is the ruling of the Court upon the demurrer to the second paragraph of the defendant's original and amended answer to the plaintiff's complaint.

He says that the complaint is bad under the Indiana code, and that the demurrer reaches back to the first bad pleading; that "it is bad because it does not contain facts sufficient to constitute a cause of action, in this, that it does not aver that a copy of the bill of lading was filed." This, he admits, is rather technical, as the record shows a copy was filed. It is insisted that Section 5 of the Act of 1872 abolishes the common law practice in the Circuit Courts for the District of Indiana, and that the plaintiff was bound to confine his pleading to the Indiana code. It is true said section requires that the pleading and practice, except in equity and admiralty cases, shall conform as near as may be to the rules of pleading and practice in the State Courts, but said act does not abolish the common law jurisdiction and practice given these Courts under the 11th Section of

the Act of Congress of 1789. 1 U. S. St. at large, 78. The 5th Section of the Act of 1872 does not take away the common law right of action, but adopts the code as a matter of convenience, but should he be right upon this view of the case. he has waived this objection by his plea, and set up the bill of lading himself and relies upon it as the defense in the action.

The defence made in the answer is in the nature of a plea of confession avoidance. He says: "The defendant admits that said plaintiff delivered to the defendant's agent at Columbus, Mississippi. the several bales of cotton men-in the complaint; that said agent executed and delivered to the plaintiff the bill of lading of which a copy is made an exhibit to the complaint; that the 30 bales of cotton were never delivered to the plaintiff in Boston, Massachusetts, as is alleged in said complaint." Then the defendant goes on in the amendment and attempts to avoid the effect of his confession of the plaintiff's prima facie right of action.

The tendency of this plea is to admit an apparent right in the in the plaintiff, viz: that the defendant did, as alleged in the declaration, execute the instrument and broke the covenant therein contained. and would therefore, prima facie, be chargeable witn damages on that ground; but shows new matter not before disclosed, by which the apparent right is done away. Stephen's Pleading, 207.

When goods in the custody of a common carrier are lost, the presumption of law is that it was occasioned by his default, and the burden is upon him to show that it arose from a cause for which he is not responsible. [11 Pick. 43–12, How. 272–347.] Supreme Ct. Nelson vs Woodruff 11 Black, 156–7 Cir. (Ill.) Hunt vs. Cleveland, 6 McClane 76.

It is insisted that the "declaration is bad for not either avering the particular manner in which the goods were lost, so that the Court might know whether the loss was within the exception, or by expressly negativing the exception."

The defendant has shown in his plea that the exception in the bill of lading applied only to that part of the route on which said goods were shipped, as lay between Evansville and Boston, and on that portion of the route from Columbus, Miss., to Evansville, Ind., on which the 30 bales of cotton were destroyed, the bill of lading made no exception. It would be bad pleading for the plaintiff to negative an exception which did not enter into his cause of action. The cotton was destroyed between Columbus and Evansville before it reached Evansville, and not having restricted its common law liability on that portion of the route as lay between Columbus and Evansville, they thereby became liable as insurers.

The object of all pleading, as I understand it, is to oblige the parties to come to issue; that is, so to plead as to develop some question (or issue) by the effect of their own allegations, and to agree upon the question as the point for decision in this cause, thus rendering unnecessary any retrospective operation on the pleadings for the purpose of ascertaining the matter in controversy. Stephen on Pleading, 149.

The defendant admits "the plaintiff delivered to the defendant the cotton mentioned in the complaint; that said agent executed and delivered to the plaintiff the bill of lading of which a copy is made an exhibit to the complaint; that said 30 bales of cotton were never delivered to the plaintiff in Boston, Massachusetts, as is alleged in said complaint." See printed record, page 5. Here is a clear *prima facie* case. But the defendant says that the plaintiff ought not to maintain its said action against defendant, because he says: That said 30 bales of cotton, for the non-delivery of which this action is prosecuted, were, with other bales of cotton, placed upon the cars of the Mobile & Ohio Railroad to be transported thereon by the defendant's road and other connecting roads to Boston, there to be delivered to the plaintiff; that while the said 30 bales of cotton were so laden upon said cars and in transition between Colum-

bus, Mississippi, and Evansville aforesaid, and before the same was delivered to the defendant at Evansville to be transported upon its road as aforesaid, became and was by accident and without any fault upon the part of the defendant, wholly destroyed by fire, whereby the same was wholly lost, and whereby it became and was impossible for the defendant to deliver the same to the plaintiff."

The amendment made to this plea, on printed record, page 7, after all the verbiage is taken out of it, is substantially the same, except that it alleges "that, prior to the issuing and delivery of said bill of lading, said agent had, in pursuance of a universally recognized useage of carriers of cotten, whether by steamer or railroad, in said State of Mississippi and other cotton growing States, stipulated that said defendant and all others carrying said cotton should be exempt from loss by fire, and upon delivery of said bill of lading or receipt, said plaintiff's agent had his attention called to the red lines in said receipt exempting said defendant from any such liabilities from Columbus to Boston, and said agent then and there accepted the same with that condition, and upon that consideration immediately obtained insurance from loss by fire upon the same." It will be seen from the reading of the red lines in the bill of lading, (made a part of this plea) that it contains no such conditions as being exempt from loss by fire from Columbus to Boston; that exemption mentioned in the red lines only exempt the defendant from loss by fire from Evansville to Boston, no exemption from loss by fire from Columbus to Evansville. The demurrer to this plea tenders an issue at law, and involves the legal interpretation of the bill of lading, which seems to be the only question in the case. If the exception in the bill of lading is to be interpretated as applying to the whole distance from Columbus to Boston, then the plaintiff has no right of action; if it does not, then the judgment must be confirmed.

As to the construction of said bill of lading, it is insisted by the defendant in argument that "the first question

arises upon the bill of lading, and the second on the construction of the exception in the bill of lading." This is true, but say in construng it "that the bill of lading acknowledges the receipt of the cotton at Columbus, Mississippi, but only undertakes to carry the same when it arrives at Evansville, and to construe the undertaking according to its terms, the Railroad Company is not liable till the goods reached Evansville, and as the answer shows that the goods never reached Evansville and were never delivered to the company within the terms of the contract sued on, there is no liability." This is very strange logic, the conclusion remarkable; not founded upon any law that I have ever read, and I am sure not upon any reasonable rule of construction. Where did the plaintiff part from the possession of its cotton? Who received it? Who was responsible for it after the defendant received it? The plaintiff delivered the cotton to the defendant at Columbus, who received it and agreed to deliver at Boston. The defendant having received and taken charge of it, became responsible for its safe delivery. It will not do to say that the defendant is not liable for the cotton after he had received it, without restricting its common law liability between Columbus and Evansville. Having received it at Columbus it was the duty of the defendant to deliver it at Evansville, as the plaintiff had lost all power or control over it, and exclusively in the hands of the defendant who must be responsible for its safe delivery at Evansville, where the defendant had agreed to receive and forward it from Evansville to Boston upon the restricted terms of the bill of lading as applied to that portion of the route from Evansville to Boston.

Again it is insisted that the "active portion of the contract upon which the action is brought, the agreement to carry and deliver, and the failure to do which is the breach assigned, only applies to goods delivered at Evansville." The plaintiff delivered the cotton to the defendant at Columbus, who agreed to deliver it at at Boston. Thirty bales of

the cotton not being delivered within a reasonable time, the plaintiff brought its action to recover the value of the 30 bales not delivered. Must the plaintiff aver that the 30 bales of cotton was received at Evansville? If it had, it would have averred a thing that was untrue. If the defendant had answered that the goods had been received at Evansville and that the same was destroyed by fire while in transatue between Evansville and Boston without the fault of the defendant, then that would have been a good answer under the bill of lading; but the defendant's plea states that the cotton was destroyed by fire while in transatue between Columbus and Evansville, and is therefore bad because the common law liability is not restricted in the bill of lading as between these two points.

Again the defendant says, that "if we construe the agreement according to its plain import, the answer is a defence." Why? "They say no agreement to carry, consistent with the answer, can be predicated upon the bill of lading." Now, the construction here given by the plaintiff in error to the bill of lading is in substance that if the defendant did receive the cotton at Columbus, he did not agree to carry it to Evansville, and therefore the cotton while in transatue from Columbus to Evansville was at the risk of the plaintiff; hence they say "no agreement to carry." When did the defendant's responsibility begin? Was it at Columbus or Evansville? If at Columbus, then the defendant is liable; if at Evansville, the plaintiff has no right of action. I contend that the responsibility commenced at Columbus the very moment the cotton was received. "The responsibility attaches from the moment of the receipt." Flanders on Shipping, sec. 198. "Contracts to forward goods from one place to another and distant place, subject the party as common carrier for the whole route, although his own transportation line extends only part of the distance, and the loss occurs on a portion of the route in which he is not interested." Same book,

sec. 311 (note 1) 3 Sandf. Sup. R. 610. Supreme Ct. Bulkley vs. Naumkeag Steam Cotton Company, 24 How. 386.

Upon the second point attempted to be made, it is asserted to be "too simple for argument; that it is not denied that it is competent to introduce these exceptions, and that the Court will enforce them."

The exceptions referred to are not applicable to this case, unless the Court should hold that they must be construed as applying to the whole route from Columbus to Boston. But should the Court hold otherwise, the exceptions referred to cannot be a material question in this case.

The question is as to the sufficiency of the answer. Admitting that every word of the answer is true, which is done for the purposes of this demurrer, does it constitute a valid defense to the action?

One of the objectionable parts of said answer reads as follows: "Prior to the issuing and delivery of said bill of lading, said agent had, in pursuance of a universally recognized usage of carriers of cotton, whether by steamer or railroad, in said State of Mississippi and other cotton growing States, stipulated that said defendant and all others carrying said cotton should be exempt from loss by fire, and upon the delivery of said bill of lading or receipt, said plaintiff's agent had his attention called to the red lines in said receipt, exempting said defendants from such liability from Columbus to Boston." In the first place, the defendant is attempting to set up a usage or custom not consistent with the bill of lading. Where there is a written express contract, by which the parties have fixed and defined their obligations and duties, it cannot be controlled or varied, or contradicted by a usage or custom; for that would be, [redacted] to admit parol evidence to control, vary or contradict written agreements. Flanders on Shipping, sec. 192.

When a party by his own contract creates a duty or charge upon himself, he is bound to make it good, and is not excused, although prevented by inevitable necessity,

because it is said he might have provided against it by his contract. Hern vs. Whitmore, 2 Cowp. 784. Parsons vs. Watson, 2 Id. 785.

Parties are presumed to intend what they have put into writing. If the defendant failed to provide against loss by fire between Columbus and Evansville they would have so provided for it, but having made a contract in which they stipulated that they would not be responsible for the distruction of the cotton by fire between Evansville and Boston, they are presumed to have waived any exception as between Columbus and Evansville, and the Court will not permit them to prove a usage or custom which may vary or contradict the written contract. The attention of the agent might have been called to the conditions in the printed red lines in the bill of lading, and we suppose it to be true that he read them, and having read them he saw that they only applied to that portion of the route between Evansville and Boston. Hence I say that the custom sought to be set up, and the attention of the agent being called to the exception in the red lines, is no defence to this action.

In refference to the case of Woodward vs. The Illinois Central Railroad, cited by the counsel on the opposite side, certainly does not help his case any, as it must be seen that that case cannot be said to be similar to the one at bar. In that case the Illinois Central Railroad received the goods and executed a through bill of lading from Memphis to Baltimore. The steamer John H. Dickey was only the medium adopted by the road to carry from Memphis to Cairo to Graham, Able & Co., agents of the Illinois Central Railroad, to be forwarded to Baltimore, "*fire and the unavoidable dangers of the river only excepted.*" This being a through bill of lading applying to all portions of the route, the exceptions were as applicable to the road as it was to the river; not a word was said as to when the exception was to take effect. No other or different construction could be given than what was given to it by the Court. But this case is very different. Here the parties entered into a

special contract expressed in words and sentences that have no doubtful meaning. The defendants operating a railroad between the city of Evansville and Terre Haute, Indiana, desirous of obtaining freight for its road, sent their agent down to Columbus, Mississippi, to make contracts and receive freight and forward the same to their road at Evansville, receives 200 bales of cotton from the plaintiff at Columbus, and enters into this special contract. The railroad company received the 200 bales of cotton at Columbus and consigns it to its road at Evansville, and agrees that "*upon the arrival at Evansville of the property above described and consigned*," that "*they would receive and forward the same to destination, upon the following conditions.*" After reciting the conditions, it goes on to say: "*said property to be forwarded immediately after its arrival at Evansville, or as soon thereafter as it is ready for shipment.*" The agent at Columbus receives the property and consigns it to the company at Evansville. The company agrees to *receive* it upon its arrival at Evansville, and to *forward* it upon the "*following conditions.*" How can language be made more plain? It needs no *construction*; "he that runs may read." If the defendant had intended to have provided against loss between Columbus and Evansville, he would have used very different language. We must presume the parties meant and intended exactly what they have put in writing; no rule of interpretation can construe the *exceptions* to apply to that portion of the route from Columbus to Evansville. If the parties had so intended they would have used apt language for that purpose that would have admitted of no doubtful meaning

In reviewing the argument of the opposite counsel, I have passed over several attempts of *hair splitting*, deeming it wholly unnecessary to notice them, as the Court will take the case and settle it in the light of well settled principles of law, and a broad sense of justice.

Upon the rules of interpretation of written contracts as laid down by the law writers and so well defined, let me

add in conclusion that where a construction is to be put upon a writing, it is to *bear that interpretation which the words in their literal and natural meaning would signify*, and if that be *clear of doubt, no other construction can be given.* Hans vs. Smith, 3 Fairf. 429. The rule is, that a deed is to be taken most strongly against the agent or contractor in favor of the other party. 2 Bl. Cm. 380. If a party so leaves anything ambiguous in his expressions, such ambiguity must be taken more strongly against himself, as if a carrier gives two different notices limiting his responsibility in case of loss, he will be bound by that which is the least beneficial to himself. So, also, if an instrument be couched in such ambiguous language as to make it doubtful, whether it be a bill of exchange or a promissory note, the holder may, at his election, as against the party who made it, treat it as either. Mayer vs. Isaacs, 6 M. & W. 612. Edis vs. Burry, 6 B. & C. 433. The general mode of construing instruments of writing in which there are *exceptions*, is to let the *exceptions control the instrument so far as the words of it extend, and no farther;* and then upon the case being taken out of the letter of the exception, the deed operates in full force. Chitty on Contracts, 87. So in case of *exception* in a lease, that if there be any doubt about the meaning of the *exception*, the words thereof, being the words of the lessor, are to be construed favorably for the lessee, and against the lessor. 94.

In any view of this case, I can see no good reason why the Judgment of the Circuit Court should be reversed.

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